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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1328

ROY D. KEEHN, as Receiver of Central Mutual Insurance Company of Chicago, an Illinois corporation,
Petitioner,

vs.

BRADY TRANSFER & STORAGE COMPANY, an Iowa corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRADY TRANSFER & STORAGE COMPANY, an Iowa corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Roy D. Keehn, as Receiver of Central Mutual Insurance Company of Chicago, an Illinois corporation, respectfully represents that:

I.

Summary Statement of the Matter Involved.

This is a suit by the statutory receiver of an Illinois mutual assessment insurance association, Central Mutual Insurance Company of Chicago, (hereinafter sometimes called "Company") for collection of an assessment made

against the respondent as a policyholder and member of said Company. The District Court of the United States for the Northern District of Illinois, Eastern Division, granted the motion of petitioner for a summary judgment against respondent, and upon appeal this judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit.

The facts are not in dispute. The respondent, an Iowa corporation, was admittedly a member of the company by virtue of its acceptance and retention of a policy of insurance. The respondent "had the benefit of insurance protection for eleven months, and in that time the company investigated and settled a number of claims against defendant (respondent); and it had this protection at lower rates because the policy was issued by a mutual company," (R. 67.) The company was organized under the Illinois statutes, Chapter 73, State Bar Association, Edition 1935, Section 287, *et seq.*, and in accordance with by-laws of the company adopted pursuant to said statutes, the policy in question contained a proper provision for assessment liability.

This provision was contained in all policies issued by the company pursuant to the mandatory provisions of the Illinois statutes applicable to such companies as follows:

> "Par. 300. Premiums—By-laws—Liability of policyholders, Sec. 14. *The by-laws shall provide for a cash premium and may limit the contingent liability of the members to an amount not less than one or more than ten times the cash premium expressed in the policy. The maximum contingent liability of the holder of each policy shall be plainly stated as a part of each policy. The by-laws* may also provide for policies to be issued for cash premiums without contingent liability of policyholders, as provided in section 15. (Italics ours)

The policy in question was issued for a term of one year,

commencing on September 7, 1935, and ending on September 7, 1936, and was cancelled by mutual consent on August 16, 1936. At the suit of the Attorney General of the State of Illinois, the company was found to be insolvent on January 11, 1937, and was taken over for liquidation by the Director of Insurance of the State of Illinois at that time and the liquidation proceeded by the Receiver appointed by said Director of Insurance, and under the direction of the Circuit Court of Cook County, Illinois, pursuant to the Illinois statutes. The Circuit Court of Cook County on March 19, 1940, ordered an assessment of one times the cash premium levied against all holders of policies in the company who had held a policy at any time from January 31, 1935 to January 11, 1937, inclusive, and the Receiver was authorized to collect the same.

By further order of the Circuit Court of Cook County on July 1st, 1940, Assessment Roll No. 1 was ordered spread of record in said court, levying an assessment against the policyholders therein named, including the respondent corporation. The assessment against respondent was $10,096.89 which was not paid when demanded by the receiver. (R. 42.)

The cause was removed to the District Court of the United States for the Northern District of Illinois, Eastern Division, by reason of the diversity of citizenship of the parties.

The amended and substituted answer of the respondent corporation was filed on June 26, 1944 (R. 10), and the case being at issue, petitioner filed in the District Court of the United States his motion for summary judgment pursuant to the statute (R. 34), which motion was supported by the affidavit of petitioner, (R. 34-58).

Thereafter on February 13, 1946, the District Court granted petitioner's motion and entered a summary judgment against respondent in the sum of $9,280.73 with interest thereon from March 13, 1946, (R. 72) (64 Fed. Supp. 392).

On April 15, 1946, the respondent filed in the clerk's office of the District Court, its notice of appeal, and on January 7, 1947, the United States Circuit Court of Appeals for the Seventh Circuit rendered its opinion (R. 89-100), reversing the judgment appealed from and remanded the cause to the District Court with directions to proceed in accordance with the views expressed in the opinion. Petition for rehearing (R. 105) was filed within the time fixed by law, and, on February 5, 1947, said petition for rehearing was denied. February 13, 1947, the mandate of the Circuit Court of Appeals was issued and forwarded to the clerk of the District Court. The opinion of the Circuit Court of Appeals is reported in 159 F. (2nd) 383.

The defenses relied on by respondent in the Circuit Court of Appeals were two:

1. The third separate defense (R. 13-17); that the insurance company secured its license to do business in Iowa by means of fraudulent representation; that the policy was therefore void, and could not be the basis of any assessment liability; and that such fraudulent representation consisted of representing itself to be solvent when in fact it was insolvent, in violation of pertinent sections of the Iowa statutes.

2. The Fourth Defense, (R. 17-19); that the Iowa statute provided that a copy of the application should be attached to the policy and that such should contain therein a reference to the contingent liability; no application being attached, there is no assessment liability.

II.

Jurisdictional Statement.

Jurisdiction is invoked under Section 240 of the Judicial Code of the United States, (Tit. 28 U. S. C., Sec. 347) and United States Supreme Court Rule 38.

Petitioner is advised by counsel and believes that the judgment of the Circuit Court of Appeals violates the rights of petitioner in the following respects:

(1) The decision is in conflict with two decisions of the United States Circuit Court of Appeals for the Fourth Circuit on the same matter and, in fact, involving an assessment against other members and policyholders of the same mutual company.

(2) An important question of local law has been decided in a way probably in conflict with applicable local decisions.

(3) The decision departs so far from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision.

(4) It involves an impairment of the obligation of contract contrary to Article I, Section 10, of the Constitution of the United States.

(5) It involves a deprivation of property without due process of law contrary to Article XIV, Section 1 of the Amendments to the Constitution of the United States.

In these circumstances petitioner requests review under the federal statute above cited.

The decisions of this court which are believed to sustain jurisdiction to review and reverse the ruling of the Circuit Court of Appeals are as follows:

Modern Woodmen of America v. *Mixer*, 267 U. S. 544.

Sovereign Camp v. *Bolin*, 305 U. S. 66.

Broderick v. *Rosner*, 294 U. S. 629.

III.

The Questions Presented.

The questions presented are as follows:

1. Did the court improperly decide the issues in conflict with prior decisions of the Fourth Circuit Court of Appeals.

2. Did the court improperly construe the local law in conflict with applicable local decisions?

3. May Sec. 8909 of the Iowa statutes be applied, without violation of the constitutional guaranties providing for equal protection of the laws and against impairment of contracts, to assessments levied in judicial proceedings in Illinois for the liquidation of an insolvent Illinois mutual assessment insurance association?

4. May any court constitutionally treat membership in a foreign mutual assessment plan insurance association as though the obligations thereby created were merely those of an Iowa contract?

5. May the operation of an Iowa statute nullify valid contractual obligations, based on Illinois statutes, voluntarily assumed by citizens of Iowa, as members of a mutual insurance organization chartered in another state?

IV.

The Reasons Relied on for Allowance of the Writ.

A writ of certiorari should be granted for the following reasons:

1. The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with two decisions of the United States Circuit Court of Appeals for the Fourth Circuit, involving the collection of assessments against former members and policyholders in the liquidation of the same insurance organization.

2. The decision of the Circuit Court of Appeals is based on construction of certain Iowa statutes, which construction is arbitrary, unwarranted and improper, and in conflict with decisions of the Supreme Court of Iowa involving the same principles and almost identical factual situations.

3. Other policyholders and members of Central Mutual Insurance Company of Chicago residing in many other states have been required by the courts thereof to pay the assessments adjudged to be due petitioner, based upon the assessment levied in and approved by the Circuit Court of Cook County, Illinois, in suits brought in these various other states. It is unfair and inequitable to the creditors of Central Mutual Insurance Company of Chicago and to the thousands of other members and policyholders who have already paid these assessments and it interferes with an orderly and equitable liquidation of the company's affairs and unreasonably burdens and otherwise obstructs interstate commerce to permit Iowa policyholders to evade their assessment liability.

4. Many of the states in which Central Mutual Insurance Company of Chicago did business have by statute imposed conditions somewhat similar to those in Iowa relied upon by respondent. It will clarify the situation and obviate the necessity of considerable further litigation for this court now to determine with finality the power of the states to nullify statutory obligations voluntarily assumed by their citizens as members of mutual insurance companies chartered in other states.

Wherefore, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the Circuit Court of Appeals of the United States for the Seventh Circuit to the end and that said cause may be reviewed and determined by this court as pro-

vided by law; that the judgment of the Circuit Court of Appeals of the United States for the Seventh Circuit be reversed and the judgment of the District Court of the United States, Northern District of Illinois, Eastern Division, be reinstated; and that petitioner may have such other and further relief in the premises as to the court may seem appropriate and just.

ROY D. KEEHN, as Receiver of
Central Mutual Insurance Company
of Chicago, Petitioner

By: Ferre C. Watkins
William H. Beckman
Charles F. Hough
Ira W. Hurley
Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.[1]

The Opinion Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 159 Fed. (2nd) 383.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals is in direct conflict with the decisions of the Fourth Circuit Court of Appeals in the case of Keehn v. Barnwell Bros., 137 Fed. (2nd) 257 and Keehn v. Parrish Dray Line, 145 Fed. (2nd) 646.

The decision of the Circuit Court of Appeals for the Seventh Circuit sustained respondent's third separate defense that the insurance policy sued on is void because petitioner secured its license to do business in Iowa by fraudulently representing that it was solvent; and respondent's fourth separate defense that a copy of the application for insurance referring to the contingent liability of the insured was not attached to the policy as provided by Iowa statute. Petitioner's position is that neither of these defenses may be successfully asserted by respondent as a defense to the assessment in question. The decisions of the Circuit Court of Appeals for the Fourth Circuit clearly support petitioner's position. *Keehn* v. *Barnwell Bros.*, 137 Fed. (2nd) 257 (CCA 4th) involved assessment col-

[1] Statement, jurisdiction and questions presented, which are set out in the petition, will not be repeated here.

lections against former members and policyholders of the same mutual company involved in the present case. In that case it was contended that the receiver was the agent of the Director of Insurance of the State of Illinois and therefore estopped from collecting the assessment from the policyholders inasmuch as the Director by allowing the Company to do business represented in the course of his official duties that the company was solvent from January 31, 1935 to January 11, 1937, the period of insolvency upon which the assessment was based. This defense is substantially the same defense as respondent's third separate defense sustained by the Circuit Court of Appeals for the Seventh Circuit in the present case. The Circuit Court of Appeals in the *Barnwell Bros.* case overruled the defense and stated, P. 266,

> "There is no proof that the defendant relied on the director's statements when prior thereto on January 9, 1935, the defendant accepted the first policy and put it into use in North Carolina. Moreover, it is obvious that in this case the receiver is acting on behalf of the creditors to secure them the protection afforded by the Illinois statutes, and that the statements of the director made in the discharge of a governmental function furnish no basis for the application of the principle of estoppel."

The same is of course true with regard to the license issued by the Director of Insurance of the State of Iowa and respondent's reliance on same.

The Circuit Court of Appeals for the Fourth Circuit in the *Barnwell Bros.* case said further, P. 265:

> *"Equally without merit is defendant's contention that the first policy in suit is not enforceable because it was delivered to the defendant in New York in December, 1934 when the Insurance Company was not qualified to do business either in New York or North*

Carolina. • • • the defendant paid the premiums on the policy and made use of it as a basis for doing business in the state."

Another claim of fraud was made by the defendant in the *Barnwell Bros.* case, which it was claimed invalidated the policy. The fraud charged was that at the time of the issuance of the first policy, the president of Central Mutual Insurance Company promised that he would furnish a policy of Lloyds of London to insure the policyholder against an assessment. The District Court found there was no fraud, but in passing on the charge, the Circuit Court of Appeals said, P. 265:

> "Moreover, the evidence is clear and strong that notwithstanding the failure of the insurance company to furnish indemnity from Lloyds, the defendant did not repudiate the policy which did not incorporate the promise, but elected to accept the policy, paid the monthly premium thereon, and filed it in 8 states in order to qualify to do business therein. In addition the defendant filed a claim with the receiver for losses insured under the policy and received a dividend thereon. Having made its election the defendant cannot now repudiate its obligations under the policies but is relegated to such counter-claim against the receiver for breach of the oral promise as the law may recognize."

In the case at bar the situation is practically identical. Conceding that respondent actually did rely upon the representations of Central Mutual made to the director of insurance of the state of Iowa, it nevertheless, as the defendant in the *Barnwell* case, elected to accept the policy, paid the monthly premiums thereon and filed copies of policies in New York, Illinois, Iowa, Ohio, Missouri, and Pennsylvania in order that its trucks might operate in those states and collected on many claims made on said policy, (R. 54-56); Finding of District Court, (R. 67).

The decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Keehn, Receiver,* v. *Parrish Dray Line* decided November 4, 1944, 145 Fed. (2nd) 646, involved the attempt of the petitioner to collect certain assessments in South Carolina. The policyholders defended on the ground that certain sections of the South Carolina code had not been complied with. Sections 8103, 8104, and 8097 of the South Carolina Code provide for the admission of mutual insurance companies organized outside of the state to be licensed to do business in South Carolina upon complying with certain requirements. Generally speaking, these requirements are very similar to those of Iowa and to the laws of most states. Section 8097 provides that the maximum premium payable by any member shall be expressed in the policy or in the application. It was contended by the policyholders that inasmuch as Section 8097 referred to "maximum premium" and the reference to the contingent liability in the policies was not termed a "premium," that the receiver could not recover under the laws of South Carolina. The District Court of the United States dismissed the complaint, holding among other things that the provision of the policy relating to contingent liability did not constitute an agreement to pay an additional "premium" since it is not printed on the first page of the policy in connection with the statement of the premium but on the fourth page among the general conditions.

The Circuit Court of Appeals for the Fourth Circuit reversed the District Court saying in part, Page 649:

> "We do not think that the South Carolina law requires an interpretation of the contract which will enable South Carolina policyholders to escape the assessment which policyholders of other states are compelled to pay. It seems to us quite clear that the general conditions of the policy in which the contingent lia-

bility of the policyholder is described are part of the policy by the very terms of the contract."

It is true that the South Carolina statute says that the maximum premium shall be expressed "in the policy or in the application," and there is no requirement that it be expressed in both places. The general nature of the defense, however, was very similar to respondent's Fourth Separate Defense in the instant case. The statement of the Circuit Court of Appeals for the Fourth Circuit that the South Carolina statutes did not require an interpretation which would enable South Carolina policyholders to escape the assessment is very significant. It is a logical and reasonable holding in view of the nature of a mutual assessment organization as defined by its by-laws, and the statutes under which it was created. It gives effect to the underlying principles of mutual assessment type insurance which in many respects is a simple application of the maxim of equity "equality is equity" and is in conformity with the great weight of authority.

The natural implication of the holding in the *Parrish Dray Line* case suggests an examination and consideration of the decision of this court in the case of *Sovereign Camp of the Woodmen of the World* v. *Bolin,* 305 U. S. 66, decided in 1938. In the *Bolin* case the fraternal organization adopted a by-law authorizing the issuance of life membership certificates under which a member entering the organization at an age greater than 43 years was entitled to life membership without the payment of further dues or assessments when the certificate had been outstanding 20 years. The member in question who was over 43 years of age joined the organization in Missouri and made payments for 20 years. After his death the beneficiaries brought action to recover upon the certificate. The fraternal organization defended on the ground that the by-law making the certificate

fully paid after 20 years was ultra vires and had been so declared by the Supreme Court of Nebraska. The by-law had been prior to the death of the member in question declared void by the Supreme Court of Nebraska in which state the organization was domiciled. The beneficiaries insisted that the contract was made and delivered in Missouri and was to be construed and enforced according to Missouri law, it being also contented that the organization had no license or authority to transact business in Missouri as a corporation or otherwise and was estopped to plead the defense of ultra vires.

This court reversed the decision of the Kansas City Court of Appeals of Missouri which had held the organization liable under the terms of the certificate. Mr. Justice Roberts who delivered the opinion of the court said in part, P. 75:

> "*First. The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered.* Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and *the rights of membership are governed by the law of the state of incorporation.* Another state, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile." (Italics ours)

The characteristics of fraternal benefit organizations and mutual assessment insurance companies are practically identical. Neither are corporations, inasmuch as no shares of stock are issued, both are owned by the members who compose the organization and the charges, premiums or deposits are referred to as assessments. The logic of the *Bolin* case, therefore clearly applies to the present case.

The case of *Broderick, Superintendent of Banks of New York,* v. *Rosner,* 294 U. S. 629, decided by this court in 1935 was a case involving conflict of laws between two different states in connection with assessments in one state against citizens of another arising out of stockholders' liability in a bank liquidation proceeding. The defendant was a citizen of New Jersey and a stockholder of the bank of the United States which was organized under the banking law of New York and had its place of business in New York City. In a proceeding against the stockholders an assessment was made against all of them pursuant to the New York statutes. Suit was instituted on the assessment in question in New Jersey, the residence of the defendant. The defense was based upon a statute of New Jersey which provided that no proceeding could be maintained in any New Jersey court against any stockholder of any domestic or foreign corporation to enforce statutory liability of such stockholder if such statutory liability was created by the statutes or laws of any other state or foreign country.

The plaintiff contended that to sustain the asserted bar of the statute would violate article IV, section 1 of the Federal Constitution. The Court of Errors and Appeals of the State of New Jersey sustained the defendant's contention. This decision was reversed by this court. We quote from the opinion by reason of the fact that the case, while turning on the full faith and credit clause of the Federal Constitution, nevertheless contains most if not all of the elements of the case at bar and the opinion of this court discusses the liability generally of stockholders or members of a corporation who reside in a state different from that in which the corporation is domiciled.

> "The assessment is an incident of the incorporation. Thus the subject matter is peculiarily within the regulatory power of New York, as the state of incor-

poration. 'So much so,' as was said in *Converse* v. *Hamilton*, 224 U. S. 243, 260, 56 L. ed. 749, 755, 32 S. Ct. 415, Ann. Cas. 1913D, 1292, 'that no other State properly can be said to have any public policy thereon. And what the law of Wisconsin (New Jersey) may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration.' Compare *Bernheimer* v. *Converse*, 206 U. S. 516, 532, 51 L. ed. 1163, 1175, 27 S. Ct. 755. In respect to the determination of liability for an assessment, the New Jersey stockholders submitted themselves to the jurisdiction of New York. For "the act of becoming a member (of a corporation) is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation." *Modern Woodmen* v. *Mixer*, 267 U. S. 544, 551, 69 L. ed. 783, 785, 45 S. Ct. 389. Compare *Supreme Court, R. A.* v. *Green*, 237 U. S. 531, 59 L. ed. 1089, 35 S. Ct. 724, L.R.A. 1916A, 771; *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 622, 20 S. Ct. 509; *McDermott* v. *Woodhouse*, 87 N. J. Eq. 615, 618, 619, 101 A. 375. Obviously recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the State to escape from the performance of a voluntarily assumed statutory obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another State of which they were stockholders." (294 U. S. 629 at 643)

The law is clear in Illinois that assessments may be levied. They were levied on policies against former policyholders and members during the period in which the policy in the instant case was in effect (R. 5, 41). An assessment was levied against the respondent in Illinois in the instant case. The Iowa law asserted in respondent's fourth separate defense and sustained by the Circuit Court of Appeals

for the Seventh Circuit forbids an assessment under the facts of the present case. Is the Illinois law or the Iowa law to govern? Further, are the policyholders and members of the same mutual assessment company to be permitted to plead the defense of fraud such as is set forth in respondent's third separate defense in the Circuit Court of Appeals for the Seventh Circuit and not in the Circuit Court of Appeals for the Fourth Circuit?

Head on conflict is present. A decision by this court is needed so that multi-state collection of assessments in defunct mutual assessment insurance companies may proceed in an orderly fashion. For this reason alone, petitioner submits that the writ of certiorari should be granted.

II.

The decision of the Circuit Court of Appeals is in conflict with applicable local decisions holding that the fraud as alleged by Respondent is not a defense, where rights of innocent third parties have intervened.

The Circuit Court of Appeals should have held against the respondent on its Third Separate Defense. The Third Separate Defense, (R. 13-17), alleges that the Commissioner of Insurance of Iowa "was fraudulently induced to issue to said company authority to continue writing insurance within the state, during the period material to this action, and fraudulently induced this defendant, relying upon such representation, to purchase insurance in such company, without any knowledge that it was hopelessly insolvent," (R. 16). It is then alleged that by reason of these misrepresentations, the company was not legally authorized to write insurance in Iowa, and all policies issued by the Company in Iowa were *void* and of no legal effect (R. 17).

The Court in sustaining this defense relies chiefly upon the case of *Barker* v. *Lamb & Sons,* 99 Ia. 265, 68 N. W.

686, which is not at all analagous to the case at bar insofar as the facts are concerned. It was admitted in the *Barker* case that there had been no attempt to comply with the Iowa statutes governing the admission of foreign insurance companies to do business in the state, while in the instant case an unconditional license to do business was granted and issued, (R. 18).

The Circuit Court of Appeals has, in sustaining the respondent's Third Separate Defense, disregarded completely the effect of the opinions in two cases decided by the Supreme Court of Iowa and thereby has discriminated against the petitioner in failing to extend to petitioner equal protection of the laws as required by the Constitution of the United States. The first of these cases is *Sherman* v. *Frasier*, 112 Ia. 236, 83 N. W. 886, where suit was brought by the assignee for the benefit of the creditors of the Citizens Mutual Insurance Company of Waterloo, Iowa, a mutual insurance company, against members on their premium notes or pledges. The policyholders urged in defense that there was fraud practiced upon them in getting them to become members. It was claimed that the company represented directly to them that it was solvent; that the insurance would be furnished at a lower rate than asked by other companies; that the company was possessed of a paid-up guaranty fund of $50,000.00; that all of these representations were false and known to the company and its agents to be false, and that, therefore, the defendants never became members of the company and were not subject to assessment and their obligations were therefore void.

The Supreme Court of Iowa held none of these contentions amounted to a defense and said that the effect of the frauds was to render the contract not void, but voidable.

The other Iowa case disregarded by the Circuit Court

of Appeals is the case of *Corey* v. *Sherman*, 96 Ia. 116, 64 N. W. 828, which decision is to the same effect.

These two decisions should apply in a case where a suit is being prosecuted by an Illinois statutory receiver of a defunct Illinois company against former members and policyholders who are citizens and residents of Iowa. Once a corporation is admitted to do business in a foreign state, it does so subject to the same laws, rules, and regulations as domestic companies and is entitled to the same protection. The opinion of the Circuit Court of Appeals overlooks the underlying and controlling principle involved, which is the right of innocent third parties which have intervened since the issuance of the insurance policy in question. There are countless cases from almost every state involving the enforcement of liability, almost identical with that sought to be enforced here. We refer to the liability of bank stockholders and the liability of stockholders in ordinary corporations who have failed to pay for their stock. In the case of bank stockholders, the insolvency of the bank at the time the shares were purchased is no defense to a stockholder when he is sued by a receiver for the enforcement of stockholder's liability. The uniformly accepted rule is that such contracts are not void but voidable. This rule is well expressed by Chief Justice Rugg of the Supreme Judicial Court of Massachusetts in the case of *Commissioner of Banks* v. *Cosmopolitan Trust Co.*, 253 Mass. 205, 148 N. E. 609.

The rule is the same as to liability of stockholders in ordinary corporations, it being held that insolvency of the corporation does not of itself permit the stockholder to escape liability, *Scott* v. *Abbott*, 160 Fed. 573.

The statutes of the state of Iowa relied upon by respondent contain no provisions that policies issued where the re-

quired surplus has not been maintained are void. The Circuit Court of Appeals held the policy to be void solely by virtue of the fraud and deception practiced upon the Commissioner of Insurance of Iowa. It is conceded that the Central Mutual Insurance Company filed the requisite statements and reports with the Insurance Commissioner of Iowa and that the Commissioner issued to the company an unqualified certificate to do business in Iowa. The Third Separate Defense of the respondent, therefore, rests upon a foundation of fraud practiced by the company in obtaining a license to do business in Iowa. Fraud of that character is not a defense to a member being sued for an assessment. The case of *Dettra* v. *Kestner,* 147 Pa. 566, was decided upon an almost identical state of facts. The Supreme Court of Pennsylvania held that rights of innocent third parties having intervened, fraud practised on defendant could not avail him as a defense in an assessment suit.

The Circuit Court of Appeals states in its opinion (R. 95) that Iowa has not passed on the question of the right of the receiver of an insolvent insurance company to recover on contingent liability provisions where it obtained a license to do business when insolvent but cites on this point *Swing* v. *Red River,* 117 N. W. 442, which case was rejected by the trial court. The Minnesota court held that the foreign insurance company was not authorized to do business in Minnesota because of its failure to maintain its financial standing, notwithstanding the issuance to it of a qualified license to do business. However, the court also said in its opinion that if the insurance commissioner's certificates had been general in their terms, the insurance company would have been authorized to do business in the state and its policies which contained contingent liability provisions would have been valid.

The license in the instant case was admittedly general and therefore the *Swing* case does not apply. (R. 14, 65)

III.

The obligation of the respondent to pay its assessment is based on the Illinois statute, the by-laws of the company and the provision for contingent liability in the policy, and under applicable decisions of this court section 8909 of the Iowa statutes does not relieve the respondent of this obligation.

The Fourth Separate Defense of the respondent which was upheld by the Circuit Court of Appeals, is that there is no assessment liability on the respondent because there was no application attached to the policy containing contingent liability provisions. The policy however expressed this liability and there was liability under the by-laws against members and policyholders.

The respondent as a part of its Fourth Defense set out in part four sections of the Iowa statutes (R. 17-18) which are 8955, 8909, 8974, and 8975. (see appendix)

Section 8909 is the only one upon which the Circuit Court of Appeals bases its decision on the respondent's Fourth Separate Defense. The section is as follows:

> "8909. MAXIMUM PREMIUM. The maximum premium payable by any member of a mutual company shall be expressed in the policy and in the application for the insurance. Such maximum may be a cash premium and an additional contingent premium not less than the cash premium, or may be solely a cash premium, which premium may be made payable in installments or regular assessments. No policy shall be issued for a cash premium without an additional contingent premium unless the company has a surplus which is not less in amount than the capital stock required, at the time of the organization of such mutual insurance company, of

domestic stock insurance companies writing the same kind of insurance; but said surplus shall not be less than one hundred thousand dollars."

The Circuit Court of Appeals said with regard to this section, "It is our view that compliance with Section 8909 is a prerequisite to the creation of a contingent liability." (R. 100.)

This section, it is true, provides that the maximum premium payable by any member of a mutual company shall be expressed in the policy and in the application, but does not provide, nor can it be logically or fairly implied, that a policy issued without an application is invalid or that any of its provisions are invalid. The Circuit Court of Appeals says that the policy issued to the respondent is valid except as to the provision contained in it for contingent liability. This conclusion petitioner contends is not supported by the decision of any court, the provisions of the statute itself or other applicable sections of the same statute. Petitioner contends it to be fundamental that particular sections of statutes are to be construed in harmony with the other sections of the same act and that particular sections are to be considered and applied with reference to the legislative objective of all sections of the same act and applicable decisions of the courts.

Petitioner contends that the third and last sentence of Section 8909 made it legally impossible for Central Mutual to issue a policy that did not contain a provision for contingent liability. This section of the Iowa statute merely augments the sections of the Illinois statute under which Central Mutual was organized. It is a matter of common knowledge that seldom, if ever, is a formal application executed by a policyholder for an automobile casualty policy. The policyholder in the case at bar

through negotiation with the duly authorized agent of the Central Mutual in Iowa arranged for the execution and delivery of this policy (R. 60). It accepted the policy, had ample opportunity to observe that it contained a contingent liability provision, filed the policy in seven or eight states as a prerequisite to operating its automative equipment therein, became involved in a number of losses, which it referred to Central Mutual and accepted all the benefits accruing from membership in the company (R. 67). For such a policyholder at this time when the rights of innocent third parties have intervened to avoid its just and lawful assessment simply because no application was executed containing the contingent liability provision is not only unfair and inequitable but opposed to the great weight of authority in similar cases throughout the United States.

Petitioner calls the court's attention to Sections 8974 and 8975 of the same Iowa insurance code. Section 8974 provides that all insurance companies or associations shall upon the issue or renewal of any policy attach to such policy or endorse thereon a true copy of any application or representation of the assured which by the terms of the policy are made a part thereof or which may in any manner affect the validity of the policy. *Section 8975 provides that omission to attach a copy of the application shall not render the policy invalid but does prevent the insurance company from pleading or proving any such application or any part thereof or the falsity thereof in any action on the policy.*

These sections are part of the same Iowa Insurance Code, of which Section 8909 is a part, and all should be read and considered together.

There are three decisions of the Supreme Court of Iowa, which have passed on Sections 8974 and 8975. All of these

decisions lay down the unqualified rule that they apply to all kinds of policies issued by any kind of an insurance company doing business in the State of Iowa. These decisions are *Cook* v. *Federal Life Assn.*, 74 Iowa 746, 35 N. W. 500, *Grimes* v. *Northwestern Legion of Honor*, 97 Iowa 315, 64 N. W. 806, and *Corson* v. *Iowa Mutual Fire Insurance Assn.*, 115 Iowa 485, 88 N. W. 1086.

From these decisions it appears to be definitely established that the policy in the case at bar was valid. As a matter of fact, the Circuit Court of Appeals admits the policy to be valid but says the assessment provision is not enforceable because of failure to comply with the statutory provision regarding attachment of an application containing the contingent liability provision. The language of the Circuit Court of Appeals is as follows:

> "Even though the policy be valid, the assessment provision is not enforceable because of a failure to comply with a requirement of the statutory provision pertaining thereto." (R. 100)

We have been able to find no case in Iowa construing Section 8909. There are, however, numerous decisions of the courts of last resort in many of the states which go deeply into the questions involved on the assessment of policyholders in the mutual insurance organizations where there may be some omission or defect in expressing the contingent liability.

The case of *Pink, Superintendent of Insurance of the State of New York* v. *Town Taxi Co., Inc.*, 138 Maine 44, 21 Atl. (2nd) 656, decided in 1941 by the Supreme Judicial Court of Maine examines these questions thoroughly. Pink, as Superintendent of Insurance of the State of New York, instituted suit in Maine against Town Taxi Co., Inc. for collection of an assessment levied against all

policyholders by virtue of certain New York statutory provisions relating to contingent liability of members of mutual insurance companies. The company in question was organized under New York laws and its by-laws provided that "the members of the corporation shall be the policyholders herein." The by-laws also provided for the making of assessments when required and provided that the contingent liability of the members should be not less than an amount equal to twice the amount of the premium written in the policy. These by-laws were not set out in the policy but on the back of the policies was a notice informing the insured that by virtue of the policy he was a member of the company and informing him of the nature of his contingent liability.

The court said that it was not necessary to have an express promise to pay an assessment, that membership in a mutual company made it obligatory on members to bear their proportion of assessments "not because they promised in so many words in the contract of insurance to pay assessments but because they saw fit as policyholders to become members of a mutual insurance corporation operating under the assessment plan."

To the same effect, see *Commonwealth ex rel Schnader, Attorney General* v. *Keystone Indemnity Exchange,* 335 Penn. 333, 6 Atl. (2nd) 821.

This case involved a similar liquidation where the policies, contrary to the Pennsylvania statutes and the by-laws of the company, expressly provided that they were non-assessable. In a suit to collect assessments the court held that the policyholders were liable to assessment notwithstanding the express provision to the contrary. Assessment suits were successful on the same policies in Maryland, *Taggart, Insurance Commission* v. *Wachter* (Md.) 21 Atl. (2nd) 141.

CONCLUSION.

It is extremely important that the law be settled on the points involved in this case. The rights and obligations of members, and policyholders, and rights of third party claimants, who have personal injury, death and property damage claims spread out over a great many states, are involved, as is usual in similar liquidations. The insurance departments of the various states must have some guide upon which to determine the administration of mutual assessment insurance company affairs, the possibility of recovery in the event of liquidation and how to proceed in the liquidation.

It appears unusual that the court as against innocent third parties would even consider the Fourth Defense, that there was no application attached to the policy, where the assessment liability was clearly expressed and known to respondent. And respondent was a party to this alleged improper omission in accepting a policy without the application. Under the Iowa statute which prohibited the company from relying on any representations not expressed in the application, the respondent was in a better position than if it had signed an application. And, could it not be logically argued that respondent might not want to fill in the answers to all questions in the application? In any event, how was respondent harmed by having no application? Here respondent was running its trucks over the various states and subjecting persons to possibility of injury with no redress on its policy. The local insurance agent here was requested from the main office to secure such an application (R. 60), but apparently failed so to do. This does not look like any wrongful dealing on the part of the

company and the respondent certainly knew of the assessment liability.

As to the insolvency defense, if this is sustained, it will make it absolutely impossible to consider the liability of policyholders in a mutual assessment insurance company as an asset. If unusual losses occur, a mutual insurance assessment company will ordinarily have to be closed immediately until assessments are collected or wait until it is determined that there are sufficient other assets to pay all claims. This would appear to require that the insurance departments should have a day to day report from the company or keep one of its representatives in charge of the books and records. The respondent elected to insure in a mutual assessment company and thereby secure the benefits of a lower premium. It was, as has been stated by innumerable courts, both an insured and insurer.

All banks and other corporations are prohibited from operating while insolvent, yet when they become insolvent, collection is made upon the stockholders' liability for the benefit of creditors; and the same course should be open for third parties to collect through the receiver the assessment liability of mutual assessment insurance company policyholders. This is the purpose of the liability.

It is respectfully submitted that the Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX.

Sections of Iowa Statutes.

8909. Maximum premiums. The maximum premium payable by any member of a mutual company shall be expressed in the policy and in the application for the insurance. Such maximum may be a cash premium and an additional contingent premium not less than the cash premium, or may be solely a cash premium, which premium may be made payable in installments or regular assessments. No policy shall be issued for a cash premium without an additional contingent premium unless the company has a surplus which is not less in amount than the capital stock required, at the time of the organization of such mutual insurance company, of domestic stock insurance companies writing the same kind of insurance; but said surplus shall not be less than one hundred thousand dollars.

8955. Foreign mutual companies—surplus. Any mutual insurance company organized outside of this state and authorized to transact the business of insurance on the mutual plan in any other state of the United States or in the District of Columbia, may be admitted to this state and authorized to transact herein any of the kinds of insurance authorized by its charter or articles of incorporation, when so permitted by the provisions of this chapter, with the powers and privileges and subject to the conditions and limitations specified in said chapter; provided, however, such company has complied with all the statutory provisions which require stock companies to file papers and to furnish information and to submit to examination, and is also solvent according to the requirements of this chapter and is possessed of a surplus safely invested as follows:

1. In case any such mutual company issuing policies for a cash premium without an additional contingent liability equal to or greater than the cash premium, the surplus shall be at least two hundred thousand dollars.

2. In case of any other such mutual company issuing policies for a cash premium or payment with an additional contingent liability equal to or greater than the cash premium or payment, the surplus shall be such an amount as the commissioner of insurance of Iowa may require, but in no case less than fifty thousand dollars, provided that the provisions of this section fixing a minimum surplus of fifty thousand dollars shall not apply to companies now admitted to do business in Iowa; provided, however, that no such mutual company shall be authorized to transact compensation insurance without a surplus of at least two hundred thousand dollars unless all liability for each adjusted claim in this state, the payment of any part of which is deferred for more than one year, shall be provided for by a special deposit, in a trust company of this state, which shall be a trust fund applicable solely and exclusively to the payment of the compensation benefits for which such deposit is made, or shall be reinsured in an authorized stock company, or in an authorized mutual company with a surplus of at least two hundred thousand dollars.

8974. Copy of application—duty to attach. All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy.

8975. Failure to attach—effect. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of section 8974 it shall forever be precluded from pleading, alleging, or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1328

ROY D. KEEHN, AS RECEIVER OF CENTRAL MUTUAL INSURANCE COMPANY OF CHICAGO, AN ILLINOIS CORPORATION,
Petitioner,

vs.

BRADY TRANSFER & STORAGE COMPANY, AN IOWA CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

BRADY TRANSFER & STORAGE COMPANY, AN IOWA CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 159 F. (2d) 383. The opinion of the United States District Court for the Northern District of Illinois, which was reversed by the Circuit Court, is reported in 64 F. Supp. 392.

JURISDICTION.

Petitioner has invoked the jurisdiction of this court under Section 240 of the Judicial Code of the United States (Title 28 U. S. C. A., Sec. 347) and Rule 38 of the Rules of this court.

In support of jurisdiction, petitioner has asserted the following grounds:

(1) The decision is in conflict with two decisions of the United States Circuit Court of Appeals for the Fourth Circuit on the same matter.

(Respondent denies that there is any such conflict, or that the decisions of that court involved the same matter as the decision in the present case.)

(2) An important question of local law has been decided in a way probably in conflict with applicable local decisions.

(Respondent denies that the decision of the circuit court is in conflict with the applicable local decisions of the Supreme Court of Iowa.)

(3) The decision departs so far from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision.

(Respondent denies that there was anything unusual about the proceeding or decision in this case, and asserts that the decision conforms to the authorities.)

(4) It involves an impairment of the obligation of contract contrary to Article I, Section 10, of the Constitution of the United States.

(Respondent denies that any contract has been impaired,

since the provision in question was invalid when made. Further no such issue of constitutionality was raised either in pleading or argument in this case in circuit court or district court below.)

(5) It involves a deprivation of property without due process of law contrary to Article XIV, Section 1 of the Amendments to the Constitution of the United States.

(Respondent denies that petitioner has been deprived of any property without due process of law. Further no such issue of constitutionality has been pleaded or argued in this case in circuit court or district court below.)

STATEMENT OF THE CASE.

Petitioner's statement of facts contains certain inaccuracies and omissions. Without duplicating all of that statement, respondent submits the following statement of the case:

Petitioner is receiver of a mutual insurance company organized under the law of Illinois, Central Mutual Insurance Company of Chicago (R. pp. 3-9). Respondent is an Iowa corporation, with its principal place of business in Fort Dodge, Iowa, and is engaged in the carriage of freight for hire in Iowa, and in interstate operations in Illinois and elsewhere (R. pp. 27, 32). The policy in question, being a policy of liability insurance insuring respondent in its trucking operations, was issued by Central Mutual through its agent and branch office manager at Des Moines, Iowa, and delivered to respondent at Fort Dodge, Iowa, on September 7, 1935 (R. pp. 6, 12, 27, 32). It was cancelled by mutual agreement on August 16, 1936 (R. pp. 28, 32). Central Mutual went into receivership on January 11, 1937 (R. p. 39).

On July 1, 1940, the Circuit Court of Cook County, Illinois, having jurisdiction of the receivership proceedings, ordered an assessment to be levied against all former policyholders, including respondent, in the amount of 100 per cent of the cash premiums paid on their policies (R. p. 41). Respondent was not a party to these proceedings (R. pp. 26, 32). Demand was made for payment and refused, and the receiver commenced action in the Circuit Court for Cook County to collect the amount of the assessment, $10,096.89 (R. p. 3), respondent being subject to suit in Illinois by reason of its trucking operations there. The

cause was thereafter timely removed to the District Court of the United States for the Northern District of Illinois, Eastern Division, for diversity of citizenship (R. p. 9).

Thereafter respondent filed its amended and substituted answer (R. p. 10) and petitioner moved for summary judgment, supporting its motion by the affidavit of the receiver (R. p. 34). Respondent filed a resistance (R. p. 58), and the matter came on for trial in the district court, which sustained the motion and on March 13, 1946, entered judgment against respondent for $9,280.73, with interest at 5 per cent from July 20, 1940 (R. pp. 61-73). On appeal this judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit, which remanded the case to the district court with directions to proceed in accordance with the views expressed in the opinion (R. pp. 89-101).

The point at issue, therefore, was the sustaining of petitioner's motion for summary judgment in the district court. The ground of this motion, as stated in the affidavit of the receiver attached thereto, was as follows (R. p. 49):

> "None of the things set up in the amended and substituted answer constitute a defense for the following reasons:
>
> 1. It appears affirmatively from the record that some of the allegations of the answer are not in accord with the facts.
>
> 2. The remainder of the things set up do not constitute defenses and do not have the legal effect contended by defendant."

The amended and substituted answer set up some nine separate defenses. The district court reviewed these and concluded that none of them stated a good defense to the action (R. p. 61). When defendant (respondent) appealed to the circuit court, it elected to rely only on the Third and Fourth Separate Defenses pleaded in its answer (R. p. 90).

Petitioner incorrectly describes the grounds of the Third Separate Defense in his Statement at page 4. This defense contained some allegations of fraud on the part of Central Mutual in obtaining its license to transact business in Iowa, but the principal ground of the defense, and the one relied on in the circuit court, was that the policy in question was not a valid assessable policy because it was written in Iowa by Central Mutual at a time when it was insolvent and not possessed of the surplus and reserves required of foreign mutual companies as a condition to transacting insurance business within the State of Iowa by Section 8955 and 8956 of the Code of Iowa, 1935 (R. p. 13). The motion for summary judgment did not deny the insolvency so alleged, but merely asserted that these facts even if true did not constitute a defense to the action.

The Fourth Separate Defense alleged that the assessment provisions of the policy in question were void because the policy was issued within the State of Iowa without any application therefor stating the maximum contingent premium for which insured was liable, as required by Section 8909 of the Code of Iowa, 1935 (R. p. 17). It was admitted that no application was ever taken for this policy of insurance (R. pp. 29-30, 32).

The policy in question provided (R. p. 38):

> "The contingent liability of the assured hereunder is limited to one time the premium named herein and no more. The assured is given and hereby accepts notice that by virtue of this policy he is a member of the Central Mutual Insurance Company of Chicago * * *."

There was no other provision in the policy of insurance with reference to the liability of the insured to an assessment.

The respondent was not, as stated by petitioner in his

Statement at page 2, "admittedly" a member of the company. Respondent has never admitted that it became a member of the company as a result of its transaction with Central Mutual.

Central Mutual was licensed by the Commissioner of Insurance to transact business in Iowa on September 20, 1932, and this license was revoked by the Commissioner on December 31, 1936 (R. pp. 30, 32).

ARGUMENT.

I.

The decision of the circuit court of appeals is not in conflict with the decisions of the Fourth Circuit Court of Appeals cited by petitioner and in any event such conflict would arise out of the local law and not constitute ground for certiorari.

Petitioner alleges that there is "headon" conflict between the decision of the circuit court in this case and the decisions of the Fourth Circuit in *Miller* v. *Barnwell Bros.*, 137 F. (2d) 257, and *Keehn* v. *Parrish Dray Line*, 145 F. (2d) 646. Both of these cases were brought by the receiver of Central Mutual against a policy holder to collect the assessment. The Barnwell Bros. case arose in North Carolina. Defendant pleaded fraud based upon a promise made by the president of Central Mutual to provide a Lloyd's of London policy to insure defendant against assessment liability. It was held that this promise was not made with intent to deceive and further that defendant had not repudiated the contract upon failure to receive the Lloyd's policy. Defendant further pleaded that the policy was unenforceable because Central Mutual was not qualified to do business in North Carolina. It was held that there was nothing to show that the policy was not lawfully issued and in effect under the laws of states other than North Carolina, and that Central Mutual obtained a license to transact business there before the policy was filed in that state.

In sustaining the Third Separate Defense in the present case, the circuit court of appeals held that a policy written

by a foreign mutual company in the State of Iowa while such company was insolvent and therefore in violation of Section 8955 of the Code of Iowa, 1935, was invalid and unenforceable. While this defense also pleaded fraud, in the circuit court respondent relied only upon the violation of the statute which was also pleaded therein. Petitioner has persisted in arguing this matter as though nothing more than fraud were involved, although the circuit court pointed out (R. p. 95):

> "The defense here is not predicated upon a fraud perpetrated upon the Commissioner of Insurance but upon the alleged fact that the policy was issued in violation of the Iowa statute designed for the protection of the defendant (and other policyholders) and that as a result the policy was void from its inception as to the company or any rights it might have thereunder."

Obviously the Barnwell Bros. case is not in conflict with the decision in the present case.

In the Parrish Dray Line case (145 F. (2d) 646), defendant pleaded that the policy provision that the contingent liability of assured was limited to one time the premium named therein was not a sufficient statement of the maximum premium payable by insured to comply with Section 8097 of the South Carolina Code, which required the maximum premium payable to be expressed in the policy *or* in the application for the insurance. The Fourth Circuit Court of Appeals held the provision sufficient.

In the present case, in sustaining the Fourth Separate Defense, the circuit court held that failure to provide an application for the policy stating the maximum contingent liability of the insured, contrary to the requirement of Section 8909 of the Code of Iowa, 1935, that the maximum premium payable, including contingent liability be expressly stated both in policy *and* in the application for the

insurance, rendered the assessment provisions of the policy unenforceable.

Plainly there is no conflict between the Parrish Dray Line case and the decision of the circuit court in this case. Both of the Fourth Circuit cases involved different issues and statutes of different states than the present case.

If there were any conflict between those decisions of the Fourth Circuit and the present case, such conflict would still not constitute a proper ground for certiorari, since such conflict would arise out of interpretation of differing local laws. The Circuit Court of Appeals for the Seventh Circuit in the present case was attempting to ascertain and apply the statutes and decisions of Iowa to a case which was governed by the law of Iowa. Petitioner never attempted to contest respondent's assertion made in pleading and in argument that the law of Iowa controlled as to the validity of the policy sued upon. The circuit court stated (R. p. 92):

> "The parties concede that the question must be decided in accordance with the law of the State of Iowa, and they also agree that there is no adjudicated case in that state exactly in point, although both cite cases from that state which it is claimed by analogy and reasoning support their respective contentions."

It is respondent's understanding that since the decision of this court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, the federal courts are to be deemed governed as to all non-federal issues by the decisions of the appropriate state courts, as well as by local state statutes. Since that decision, this court will not grant certiorari to review conflicting circuit court decisions if the conflict is attributable to a difference in local law. In *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 205, this court said:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for

granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

That the local law of Iowa as determined and applied by the Seventh Circuit Court of Appeals may differ from the local law of North and South Carolina as applied by the Fourth Circuit Court of Appeals, even in cases involving the same receiver as plaintiff and policy holders of the same mutual company as defendants, is not a sufficient ground for certiorari.

The purpose of petitioner's citation of the cases of *Woodmen of the World* v. *Bolin*, 305 U. S. 66, and *Broderick* v. *Rosner*, 294 U. S. 629, at pages 13-16 of his Brief, is not apparent to respondent. Both cases involve the application of the full faith and credit clause, Article IV, Section 1, of the Constitution. The full faith and credit clause has never been raised in pleading or argument in this case in the courts below, and it is not included among the grounds which petitioner specifies in his petition for writ of certiorari. The first of these cases holds that a state other than that in which a fraternal organization is incorporated cannot attach to the certificate of membership rights against the society which are refused by the law of the domicile. The second case holds that New Jersey cannot by statute prohibit its courts from entertaining actions to enforce the statutory liability of stockholders of banks created by the laws of any other state.

Petitioner now asks at page 17 of his Brief whether Iowa law or Illinois law is to govern. However, he has never, before filing this petition, attempted to dispute the controlling effect of the Iowa law in this case. Respondent pleaded in its answer that the contract of insurance was entered into in Iowa and that its validity and construction must be determined by the laws of that state (R. pp. 13-14).

In the motion for summary judgment, petitioner questioned the construction of the Iowa law, but he did not deny that it was applicable (R. p. 49). In the circuit court, respondent devoted a portion of its brief and argument to the proposition that the Iowa law governed. Petitioner did not contest the issue. Under the circumstances, the circuit court stated in its opinion (R. p. 92):

> "The parties concede that the question must be dealt with in accordance with the law of the State of Iowa."

Petitioner has waited too long to take issue on the question of the controlling force of the Iowa law in this case, and he is now irrevocably bound to the proposition that the decisions and statutes of Iowa must govern as to the validity of the policy in suit.

In any event, respondent does not understand that the decisions of this court permit of any other view than that the statutes and law of the state where the contract was entered into must be paramount in such a case as this one. In *John Hancock Mutual Life Insurance Company* v. *Yates*, 299 U. S. 178, this court held that the full faith and credit clause required the courts of Georgia to apply the statutes of New York to determine the effect of the attachment to the policy of a copy of the application for the insurance, where the policy was issued and delivered in New York. And in *Pink* v. *A. A. A. Highway Express, Inc.*, 314 U. S. 201, this court affirmed where the Georgia court applied the law of Georgia, where the policy was delivered, to determine whether the receiver of a mutual insurance company could recover an assessment against a policyholder. Chief Justice Stone, speaking for the court, said at page 211:

> "The interpretation and legal effect of policies of insurance entered into by the inhabitants of Georgia, who are sued upon them in its courts, are peculiarly matters of local concern. Were it not for the New York

statute, there could be no question of Georgia's authority to adjudicate the rights and obligations arising under the policies. And as we have seen, the only basis for the imposition by New York of its command on the Georgia court and policyholders is the assumption by the latter of membership in the New York company. But this, in the circumstances of this case, depends upon the meaning and effect of all the provisions appearing on the policies with respect to the assumption of membership, which is for Georgia to determine."

The State of Iowa has a legitimate interest in protecting the interests of its citizens acquiring policies of insurance in Iowa. *Osborn* v. *Ozlin,* 310 U. S. 62. This interest extends to a proper concern for the financial soundness of companies writing insurance contracts with its citizens. *State Farm Mutual Auto Insurance Co.* v. *Duel,* 324 U. S. 154. Even had petitioner properly raised the point, no other conclusion would have been possible than that the statutes and decisions of Iowa were controlling as to the validity of the policy of insurance in this case.

II.

The decision of the circuit court of appeals is not in conflict with applicable local decisions of the courts of Iowa in holding that the Third Separate Defense states a good defense to the action.

The Third Separate Defense is not based upon fraudulent misrepresentations made to the Commissioner of Insurance of the State of Iowa, as petitioner states. As the circuit court pointed out, the chief ground of the Third Separate Defense was the claim that the policy in question was invalid because written by Central Mutual at a time when it was insolvent, in violation of the provisions of Sections 8955 and 8956 of the Code of Iowa.

The circuit court of appeals in its opinion in this case considered the provisions of the Iowa statutes and the cases of the Supreme Court of Iowa relied upon by petitioner, as well as those cited by respondent in support of its position. The court considered and discussed the case of *Sherman* v. *Frasier,* 112 Iowa 236, 83 N. W. 886, and the case of *Corey* v. *Sherman,* 96 Iowa 116, 64 N. W. 828, upon which petitioner relies here as expressing the law of the State of Iowa. Both of these cases involved the defense of fraud practiced upon members of a mutual insurance company organized in Iowa. In the present case it is not the *fraud* that respondent is relying on but the *statutory violation* that occurred when the policy of insurance was written while Central Mutual was insolvent. These cases are, therefore, not in point and do not even suggest any rule which is applicable to the defense raised in the present case.

Respondent recognized that the proposition involved in its Third Separate Defense had not been before the courts of Iowa in any case exactly in point, and supported its argument by the citation of two decisions of the Supreme Court of Iowa which it believed pointed the way to the holding which it asked the circuit court to make. The first of these cases was *Seamans* v. *Zimmerman,* 91 Iowa 363, 59 N. W. 290, where action was brought by the receiver of an insolvent foreign mutual insurance company to recover an assessment. One of the grounds of defense was that the company had failed to comply with the Iowa statute regarding its financial condition, being a predecessor statute to Section 8955 of the Code of 1935. The Supreme Court of Iowa sustained this defense saying:

> "The power of the legislature of a state to make contracts like those under consideration void is not questioned. * * * To hold that the company may recover the assessments would be a evident violation of the spirit and intention of the statute."

The second Iowa case relied on by respondent was *Parker* v. *Lamb and Sons,* 99 Iowa 265, 68 N. W. 686, where suit was brought by the receiver of a mutual fire insurance company of Chicago to recover assessments on a policy of insurance on property within the State of Iowa. One of the defenses was that the policy was issued in violation of statutes of Iowa prescribing the financial condition of companies authorized to transact business there. The court said at page 273:

> "The contract of insurance, so far as the right of the company to insure property in this state is concerned, was void. By Section 1707 of McClain's Code it was absolutely prohibited from directly or indirectly taking any risk or transacting any business of insurance in this state unless possessed of $200,000 of actual paid up capital and complying with other conditions named in said section."

Outside the state of Iowa there are only two cases in point upon this proposition known to respondent. They are *Swing* v. *Red River Lumber Company,* (Minn.) 117 N. W. 442, and *Keehn* v. *Hodge Drive-It-Yourself, Inc.,* (C. C. A. Ohio, Hamilton County) 53 N. E. (2d) 69. The latter case involves the same plaintiff-receiver as does the instant case. Both of these decisions sustain the position of the respondent and even the district court in the present case, although it refused to follow them, recognized that they "hold squarely that even though an insurance company has formally qualified to do business in a state its pre-existing insolvency may be asserted by a policyholder to resist assessment liability".

The circuit court of appeals in this case did not disregard the law of the State of Iowa but attempted to ascertain what that law was and to apply it, utilizing such pertinent reasoning as the Iowa court has employed. Far from being in conflict with the local decisions, it is in strict accord

with them. There is no line of authority upon the exact proposition involved and for which respondent contended which announces any different result than that arrived at by the circuit court of appeals.

This court has said that jurisdiction to bring cases up by certiorari from the circuit court of appeals was not conferred upon it "merely to give the defeated party in the circuit of appeals another hearing". *Magnum Importing Company* v. *Coty*, 262 U. S. 159, 163. The decision of the circuit court of appeals does not conflict with the Iowa decisions because there are none which are precisely in point on this proposition. And since the decision follows the only cases from outside the state of Iowa which have decided the question, it can not be said that it is in conflict with the law as it would probably be announced by the Supreme Court of that state if such a case should come before it. The attitude of this court toward the granting of certiorari in such circumstances was expressed as follows by Mr. Justice Reed in *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 206, where it was determined that the local law of Pennsylvania governed the construction of a life insurance policy delivered in that state, and there was no decision by the Supreme Court of Pennsylvania upon the point in issue:

> "The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest court of the State. No decision at the present time could reconcile any 'conflict of circuits', or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even as-

suming that it is adequately presented on the record, we decline to decide the issue of state law."

The decision of the circuit court does not conflict with the applicable Iowa decisions because there are none precisely in point. It does not conflict with what the law of Iowa would probably be announced to be by the Supreme Court of Iowa because it conforms to the decisions of that court which are nearest in point, and follows the only decisions from outside the state which are actually in point upon the proposition at issue. This ground of the petition for certiorari is likewise untenable.

III.

The decision of the circuit court of appeals is not in conflict with applicable local decisions, in holding that the Fourth Separate Defense stated a good defense to the action.

The Fourth Separate Defense alleged that the policy in question was nonassessable because there was no application for the insurance which stated the maximum liability, including contingent liability, of the insured, as required by Section 8909 of the Code of Iowa, 1935 (R. p. 17).

Petitioner does not appear in Division III of his Brief to dispute the controlling effect of the Iowa statute, which the circuit court stated he had conceded, but he merely repeats the arguments made in that court as to the proper construction of the Iowa statutes. The circuit court considered these arguments in its decision in this case, but was not persuaded by them.

There are no decisions of the Supreme Court of Iowa construing Section 8909. The decisions of the Iowa court passing on Sections 8974 and 8975, referred to on Page 24 of Petitioner's Brief, have nothing to do with Section 8909,

and merely hold that Sections 8974 and 8975 apply to all kinds of insurance and all kinds of insurance companies, mutual and otherwise, so that no statement in the application can be taken advantage of by the company unless a copy of the application is attached to the policy. *Cook* v. *Federal Life Assn.*, 74 Iowa 746, 35 N. W. 500; *Grimes* v. *Northwestern Legion of Honor*, 97 Iowa 315, 64 N. W. 806; *Corson* v. *Iowa Mutual Fire Ins. Assn.*, 115 Iowa 485, 88 N. W. 1086.

Since there are no applicable decisions of the Supreme Court of Iowa, the circuit court decision certainly could not be said to conflict with the local law. The circuit court construed the statute in question according to its plain language and intent, and there is nothing to indicate that its conclusion was not a correct one.

The force of the holding of the Supreme Judicial Court of Maine in *Pink* v. *Town Taxi Co., Inc.*, (Maine) 21 A. (2d) 656, referred to by Petitioner on Page 24 of his Brief, must depend on the statutes of Maine. Presumably the case holds that under the statutes of that state a policyholder in a mutual company may be liable to assessment even though the policy does not provide that it is assessable. In Pennsylvania, it appears to be held that policies of a mutual company are assessable even when they expressly state that they are nonassessable. *Commonwealth* v. *Keystone Indemnity Exchange*, (Pa.) 6 A. (2d) 821. Also in Maryland. *Taggart* v. *Wachter*, (Md.) 21 A. (2d) 141. But this cannot be the law in Iowa, where Section 8909 of the Code requires that the maximum premium, including contingent premium, be expressly stated in the policy and in the application for insurance, and where under Section 8955 a properly qualified mutual company can issue a policy which is nonassessable by its terms. Where statute requires assessment liability to be stated in the policy, absence of such provision renders

the policy nonassessable. *Pink* v. *A. A. A. Highway Express, Inc.,* (Ga.) 15 S. E. (2d) 337, affirmed 314 U. S. 201; *Pink* v. *Georgia Stages,* (D. C., M. D. Ga.) 35 F. Supp. 437; *Keehn* v. *Parrish Dray Line,* (D. C., E. D. S. C.) 53 F. Supp. 855.

The circuit court considered that, under the Iowa statute, failure to provide for assessment liability in the application for the insurance led to the same result as failure to provide therefor in the policy of insurance. There are no authorities in point on the question either in Iowa or elsewhere, but the circuit court's decision is consonant with those cases from outside of Iowa which have dealt with a failure to comply with a statutory requirement that liability to assessment be expressly stated in the policy. There is no reason to doubt that this is also the law in Iowa.

It is not true that the decision of the circuit court is in conflict with the applicable local law of Iowa. It ascertains and applies such law. There is no basis for certiorari on this ground.

IV.

The decision of the circuit court does not depart from the accepted and usual course of judicial proceeding.

Petitioner asserts in his petition that the decision departs so far from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision. He does not, however, argue this ground of the petition in his brief, so that respondent assumes that this ground has been waived. In any event, respondent is at a loss to perceive any basis for this ground of the petition in the present proceedings.

The course of this litigation shows that after respond-

ent filed its amended and substituted answer in the district court, petitioner moved for summary judgment on the ground, that the answer stated no defense. The trial court sustained the motion and entered judgment. Respondent appealed to the circuit court on the ground that the Third and Fourth Separate Defenses constituted good defenses to the action, and the circuit court upheld the appellant and reversed. Its decision accorded with its construction of the statutes of Iowa, which both parties conceded should control, and with the only decided cases which could be found which were in point upon the propositions involved. There has not been the slightest departure from the accepted or usual course of judicial proceedings in this litigation.

V.

The decision involves no impairment of the obligation of contract contrary to Article I, Section 10 of the Constitution, and no constitutional question has previously been raised in this case in the courts below.

Petitioner does not argue this ground of the petition in his brief. Even if it has not been waived, it is obviously untenable. This provision of the constitution refers to existing contracts impaired as to their obligation by subsequently enacted legislation. It is not concerned where the statutes which render a contract invalid and unenforceable are in existence at the time the contract is entered into. The provisions of the Iowa statutes relied upon by respondent in its Third and Fourth Separate Defenses were all in force long before Central Mutual sold, issued and delivered this policy on September 7, 1935.

Furthermore, petitioner raised no constitutional questions in his motion for summary judgment in the district

court, and no such questions have been argued either in the district or circuit courts in this case. Under the rules of this court, it is only where a question of federal law has been *decided* by a circuit court that this court may grant certiorari for the purpose of settling the question (Rule 38 (5, b)). The circuit court in this case has decided no such question, because it was never raised or presented to it, and it cannot be newly raised in this court for the first time.

VI.

The decision does not deprive petitioner of any property without due process of law, and no such constitutional question has previously been raised in this case in the courts below.

Since petitioner does not argue this ground of his petition, respondent does not know in what respect he may believe he has been deprived of his property without due process. If the leisurely prosecution of this case through state, federal, district and circuit court over a period of six years does not constitute due process, it will certainly never be achieved in this imperfect world. No such constitutional question was presented in petitioner's motion for summary judgment or argued or raised in either district or circuit court below at any point in the proceedings. It is utterly without merit as a ground for certiorari in this case.

Conclusion.

This case presents no ground for certiorari by this court. The decision of the circuit court does not conflict with decisions from other circuits, but if it did, such conflict would be permissible since the decision undertakes to as-

certain and apply the local law of Iowa to a transaction which it has been conceded is governed by such law, while decisions from other circuits involve the local law of other states. The decision does not conflict with the applicable local law of Iowa. It applies Iowa statutes in accordance with the implications of Iowa decisions and the analogous holdings of courts from other states with respect to similar statutes. There are no Iowa cases in point.

The constitutional grounds presented by the petition for writ of certiorari are not argued in the brief. They have no merit in any event. Furthermore, they were not raised, argued or decided in either of the courts below at any point in these proceedings.

Of course, the answer to the fancied evils to which petitioner points in his conclusion as likely to result if this decision stands is for the mutual companies in question to comply with the laws of those states where they engage in business. Such laws are enacted for the protection of the policyholders of such companies in those states and there is no reason why they should not receive the full measure of the benefit of such protection. That was the holding of the circuit court in this case.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Sections of Iowa Statute (Code of 1935).

8909. *Maximum Premiums.* The maximum premium ayable by any member of a mutual company shall be xpressed in the policy and in the application for the ısurance. Such maximum may be a cash premium and n additional contingent premium not less than the cash remium, or may be solely a cash premium, which premium ıay be made payable in installments or regular assess- ıents. No policy shall be issued for a cash premium ithout an additional contingent premium unless the ›mpany has a surplus which is not less in amount than ıe capital stock required, at the time of the organization f such mutual insurance company, of domestic stock ısurance companies writing the same kind of insurance; ut said surplus shall not be less than one hundred ıousand dollars.

8955. *Foreign Mutual Companies—Surplus.* Any utual insurance company organized outside of this state ıd authorized to transact the business of insurance on ıe mutual plan in any other state of the United States · in the District of Columbia, may be admitted to this ate and authorized to transact herein any of the kinds ' insurance authorized by its charter or articles of in- ›rporation, when so permitted by the provisions of this ıapter, with the powers and privileges and subject to ıe conditions and limitations specified in said chapter; ·ovided, however, such company has complied with all ıe statutory provisions which require stock companies) file papers and to furnish information and to submit to :amination, and is also solvent according to the require-

ments of this chapter and is possessed of a surplus safety invested as follows:

1. In case any such mutual company issuing policies for a cash premium without an additional contingent liability equal to or greater than the cash premium, the surplus shall be at least two hundred thousand dollars.

2. In case of any other such mutual company issuing policies for a cash premium or payment with an additional contingent liability equal to or greater than the cash premium or payment, the surplus shall be such an amount as the commissioner of insurance of Iowa may require, but in no case less than fifty thousand dollars, provided that the provisions of this section fixing a minimum surplus of fifty thousand dollars shall not apply to companies now admitted to do business in Iowa; provided, however, that no such mutual company shall be authorized to transact compensation insurance without a surplus of at least two hundred thousand dollars unless all liability for each adjusted claim in this state, the payment of any part of which is deferred for more than one year, shall be provided for by a special deposit, in a trust company of this state, which shall be a trust fund applicable solely and exclusively to the payment of the compensation benefits for which such deposit is made, or shall be reinsured in an authorized stock company, or in an authorized mutual company with a surplus of at least two hundred thousand dollars.

8974. *Copy of Application—Duty to attach.* All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made

a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy.

8975. *Failure to Attach—Effect.* The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of section 8974 it shall forever be precluded from pleading, alleging, or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option.